**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D.C. 20554**

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| ***In the Matter of:*** | ) | |
| | ) | |
| ***Petition of Image Access, Inc. d/b/a NewPhone for*** | ) | |
| ***Declaratory Ruling Regarding Incumbent Local*** | ) | **WC Docket No.: 06-129** |
| ***Exchange Carrier Promotions Available for Resale*** | ) | |
| ***Under the Communications Act of 1934, as Amended,*** | ) | |
| ***and Sections 51.601 et seq. of the Commission's Rules*** | ) | |

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**COMMENTS OF ANGLES COMMUNICATION SOLUTIONS**

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BOULT, CUMMINGS, CONNERS & BERRY, PLC

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BLC Management, LLC d/b/a Angles Communication Solutions ("Angles") submits the following comments concerning the "Petition of Image Access, Inc. d/b/a NewPhone for a Declaratory Ruling" regarding the resale obligations of incumbent local exchange carriers.

## Angles' Interest in This Proceeding

Angles Communication Solutions is a competitive local exchange carrier based in Memphis, Tennessee, and authorized to offer telecommunications services in Tennessee, Mississippi, and Kentucky. Angles offers prepaid, local telephone service to residential users, including approximately twelve hundred customers in Tennessee. Angles purchases residential service from BellSouth Telecommunications, Inc. ("BellSouth") pursuant to an interconnection agreement and resells that service to its customers.

Angles has been a BellSouth wholesale customer since July, 2004. Beginning in June, 2005, Angles began requesting promotional credits on lines purchased from BellSouth and resold by Angles. A number of these requests for credit involved "cash back" promotions in which BellSouth would award a new customer a cash bonus in exchange for the purchase of regulated telecommunications services. One such promotion offers each new customer a $100 bonus for switching his local service to BellSouth and purchasing a "Complete Choice" service package.[1] Another promotion offers each new customer a $50 bonus for switching his local service to BellSouth and subscribing to two calling features and a domestic BellSouth Long Distance plan. BellSouth has offered both promotions, in similar forms, repeatedly over the past year.[2]

[1] Complete Choice offers unlimited local calls and a package of popular vertical features such as Caller ID, Call Waiting, Call Forwarding, and Three-Way Calling.

[2] See Exhibit A to the Petition of Image Access for a further description of these and other similar promotional offerings by BellSouth.

While offering these cash bonuses to new retail customers of BellSouth, the incumbent carrier has refused to give one dollar of credit to Angles for reselling these same promotions to new customers of Angles. These disputed credits now total $278,300. Within the last eight months, BellSouth has twice tried to force Angles to pay these disputed credits by cutting off Angles' access to BellSouth's ordering systems, making it impossible for Angles to add new customers or make service changes for existing customers, and threatening to disconnect completely all of Angles' customers. These disputes remain unresolved as the amounts in question grow larger each month.

Angles supports the request of Image Access and asks the Commission to declare that BellSouth's refusal to pass through to resellers the value of these cash back promotions offered in connection with the sale of regulated telecommunications services is a violation of BellSouth's federal resale obligations. Angles adopts the legal arguments set forth in the Declaratory Judgment Petition and, as discussed below, would also note that BellSouth itself has, on at least one occasion, recognized that cash back promotions must be passed through to resellers and, under pressure from competitors and state regulators, voluntarily amended a promotional offering in Tennessee in order to accomplish that result.

## BellSouth's "Welcoming Reward" Tariff in Tennessee

On January 3, 2003, BellSouth filed in Tennessee its "BellSouth Welcoming Reward Program," TRA tariff No. 2003-03, TRA Docket No. 03-00060. Under the proposed tariff, BellSouth offered to pay each new business customer a $100-per-line cash bonus if the customer would switch his local service to BellSouth and sign a twelve-month contract. To be eligible for the promotional rate, the business customer must have at least two lines, be located in Rate Group 5 (Tennessee's largest cities and the surrounding local calling areas), and annual revenue of less than $36,000.[3] Although the customer would be required to sign a twelve-month contract, the enrollment period was limited to ninety days.

In response to BellSouth's filing, the Consumer Advocate Division of the Tennessee Attorney General's Office (the "CAD") along with a coalition of competing local exchange carriers (the "Coalition") intervened in opposition to the tariff. The intervenors raised a number of issues including questions about how the tariff would be offered for resale. In response to a data request from the agency staff, BellSouth explained that the $100-per-line bonus would <u>not</u> be passed through to a reseller. For example, BellSouth said that if a reseller in Nashville requested five business lines, BellSouth would provide each line for $33.35 per month (the basic rate of $39.70 less a 16% wholesale discount = $33.35) but would not pass through the $100-per-line cash bonus.[4]

The CLEC Coalition replied that BellSouth's tariff violated the carrier's resale obligation. The TRA had ruled in an earlier proceeding that a promotional offering which required a customer to sign a twelve-month contract was a "long term" promotion.[5] Under federal law and BellSouth's SGAT on file with the TRA, such promotions must be made available for resale at the promotional rate less the applicable wholesale discount. The Coalition pointed out that these rulings required BellSouth to offer a reseller both the $100-a-line bonus (the promotional rate) and the 16% wholesale discount.

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[3] See BellSouth's revised tariff filed January 7, 2003. This document, along with all the other filings made in this docket and referenced below, can be readily obtained from the website of the Tennessee Regulatory Authority, <u>www.state.tn.us/tra</u>. All the filings are found under Docket 03-00060 in the "Non-Active Docket Index" shown on the TRA's homepage.

[4] See Letter from BellSouth dated February 11, 2003.

[5] "In Re: BellSouth Telecommunications, Inc.'s Tariff to Offer a Special Promotion for Business Customers Subscribing to Exchange Lines with Hunting," Docket 99-00936, Order issued November 7, 2000.

The Coalition also demonstrated that BellSouth's refusal to pass through the $100-a-line credit resulted in the reseller having to pay a wholesale rate that would be higher than BellSouth's retail rate. With the cash bonus, a BellSouth retail customer would pay $376.40 for each line over the length of the twelve-month contract ($39.70 x 12, less $100 = $376.40). A reseller, on the other hand, would be charged a wholesale rate of $400.20 over the same time period ($39.70 less the 16% wholesale discount x 12). In other words, the tariff allowed BellSouth to offer twelve months of service at a retail rate of $376.40 while charging a wholesale price of $400.20 for the same service over the same period.[6]

Faced with these arguments from the Coalition and some verbal encouragement from the TRA's Directors, BellSouth decided to change course.

"In the spirit of compromise," BellSouth wrote to the TRA Directors on February 21, 2003, "BellSouth is willing to alter its tariff such that it is clearly a 'long-term' promotion for purposes of resale, and BellSouth will make the $100 bill credit available at the wholesale discount to reselling CLECs."[7] In a subsequent filing, BellSouth explained that the revised tariff would allow a CLEC to purchase a business line for $316.18 over the length of the contract. The CLEC would pay the "effective rate" of $376.40 ($39.70 x 12 - $100 = $376.40) less the 16% wholesale discount or $316.18 ($376.40 x 84% = $316.18). BellSouth's compromise, which was accepted and approved by the TRA, did not resolve all the issues raised by the CAD and the

[6] See Reply of CLEC Coalition, filed February 11, 2003.

[7] Letter from BellSouth dated February 21, 2003.

Coalition, but it did address the problems created by the company's initial refusal to make the $100-a-line credit available to resellers.[8]

BellSouth's "compromise" on the cash back issue in the Welcoming Reward tariff seems compelled by established federal law. As this Commission wrote almost seven years ago, "[O]ur rules require the incumbent LEC to apply the wholesale discount to the special reduced rate."[9] Nevertheless, BellSouth today no longer recognizes its resale obligations and refuses to credit Angles with the value of cash-back bonuses offered in conjunction with the sale of regulated telecommunications services.

Calculation of the Wholesale Discount

In clarifying the resale obligations of an incumbent local exchange carrier, the FCC should also take the opportunity to address the calculation of the wholesale discount when applied to a reduced, promotional rate.

Pursuant to Section 252 (d)(3) of the federal Telecommunications Act, 47 U.S.C. §252(d)(3), state commissions are required to determine wholesale rates on the basis of "retail rates...excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Following those instructions, state commissions total a carrier's "avoided costs" and then compare that figure to the carrier's total

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[8] The TRA's order approving BellSouth's compromise tariff was later overturned on procedural grounds. Office of the Attorney General v. Tennessee Regulatory Authority, 2005 WL 3193684 (Tenn. Ct. App.). In summarizing the facts of the case, the Court noted that BellSouth's compromise was offered after two TRA Directors orally "urg[ed] BellSouth to make additional concessions to satisfy the objections" of the intervenors. Id., at 3. Following those suggestion from the bench, the Court observed, BellSouth filed a revised tariff which "provided that both the underlying service and the [$100-a-line] bill credit would be available to resellers" at the wholesale discount. Id., at 4.

[9] In the Matter of ACSI and MCI, Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997, et seq., CC Docket No. 97-100, December 23, 1999, paragraph 47.

costs of providing regulated services. The result is a "wholesale discount" generally expressed as a percentage of the carrier's tariff rates.

As long as the incumbent LEC is offering a service at the full, tariff rate, the wholesale discount percentage as applied to that tariff rate accurately captures and deducts the unspent dollars which would otherwise have paid for such things as billing, collections, and marketing. If, however, the wholesale discount percentage is applied to a cheaper, promotional rate, the incumbent would gain a windfall and the reseller would be cheated. The dollars "avoided" by the incumbent in marketing, billing and collection costs are the exactly same but the amount of dollars reflected in the wholesale deduction will be smaller.

In Tennessee, for example, BellSouth explained that its compromise tariff which the TRA adopted would be available for resale after applying the 16% wholesale discount to the reduced, promotional rate. Applying the 16% wholesale discount to the promotional rate produced a discount of approximately $60. That figure is incorrect. BellSouth's actual avoided costs are 16% of the full, non-promotional rate or approximately $76. Since the "avoided" costs saved by an incumbent selling at wholesale do not change simply because the incumbent offers a promotional reduction in the retail price, the FCC should make clear that, in this situation, the wholesale discount should be applied to the non-promotional rate in order to capture all the avoided costs.

## Conclusion

For these reasons, Angles concurs in the Petition filed by Image Access and urges the FCC to explain clearly that a cash back promotion tied to the sale of a regulated service must be offered for resale at the promotional rate. If the promotion is for longer than 90 days, the wholesale price should be further reduced by subtracting the incumbent's "avoided costs" calculated by multiplying the wholesale discount times the carrier's non-promotional rate.

Respectfully submitted,

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